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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

VAL/DEL, INC.,
a Delaware corporation, Petitioner

v.

PASCUA YAQUI TRIBE,
a Putative Indian Tribe, and
THE HONORABLE LILLIAN S. FISHER,
Judge of the Superior Court
of the State of Arizona in and
for the County of Pima, Respondents

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF ARIZONA, DIVISION TWO

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1978, the Congress enacted a Bill, P.L. 95-375, 92 Stat. 712, 25 U.S.C.A. §1300(f), which recognized members of an Arizona nonprofit corporation as members of an Indian tribe called the Pascua Yaqui Tribe. The Bill thus made them eligible for Federal assistance to Indians. It also directed the Secretary of the Interior to accept in trust, as Indian lands, real property previously conveyed to the non-profit association. The group being benefited never had any governmental organization within Arizona or within the United States. When Arizona was admitted to statehood in 1914, there was no semblance of any Yaqui Tribe within the State of Arizona or within the United States. The questions presented for review are:

1. Does congressional recognition under P.L. 95-375 vest the Pascua Yaqui

Tribe with sovereign immunity from the process and jurisdiction of the courts of the State of Arizona?

2. If P.L. 95-375 does purport to bestow such sovereign immunity, is it beyond the powers of Congress to provide for or regulate commerce with Indian tribes?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. The Honorable Lillian S. Fisher is a judge of a court of general jurisdiction within the State of Arizona as to whom a special Writ was taken to the Court of Appeals of the State of Arizona, which decision is the subject of this Petition for Certiorari.

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ON WRIT OF CERTIORARI TO
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Petitioner Val/Del, Inc., respectfully requests this Court to issue its Writ of Certiorari to review the decision of the Court of Appeals of the State of Arizona, Division Two, as to which review has been denied by the Supreme Court of the State of Arizona.

OPINIONS BELOW

The decision of the Arizona Court of Appeals as to which review is sought is attached as Appendix A and is not yet reported. The Order of the Supreme Court of the State of Arizona denying breview of the decision of the Court of Appeals is unreported and is attached as Appendix B.

STATEMENT OF JURISDICTION

The decision of the Supreme Court, denying certiorari was issued on May 29, 1985. This Petition is timely filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, §8 of the Constitution of the United States provides:

> "The Congress shall have Power To . . . regulate commerce . . . with the Indian Tribes."

The Tenth Amendment to the Constitution of the United States provided:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Public Law 95-375, 92 Stat. 712, 25 U.S.C. §1300(f) provides in pertinent part:

> "(a) Eligibility for services and assistance
>
> The Pascua Yaqui Indian people who are members of the Pascua Yaqui Association, Incorporated, an Arizona corporation, or who hereafter become members of the Pascua Yaqui Tribe in accordance with section 1300f-2 of this title, are recognized as, and declared to be, eligible, on and after September 18, 1978, for the services and assistance provided to Indians because of their status as Indians by or through any department, agency, or instrumentality of the United States, or under any statute of the United States. For the purposes of section 2005a of Title 42, the Pascua Yaqui Indians are to be considered as if they were being provided hospital and medical care by or at the expense of the Public Health Service on August 16, 1957.

* * *

(c) Receipt in trust by United States of land for Pascua Yaqui Tribe; criminal and civil jurisdiction

> The Secretary of the Interior is directed, upon request of the Pascua Yaqui Association, Incorporated, and without monetary consideration, to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property conveyed by the United States to such association under the Act of October 8, 1964 (78 Stat. 1197), and such lands shall be held as Indian lands are held: *Provided,* That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79)." Section 1300f-1.

STATEMENT UNDER RULE 28.4(c)

Since the proceeding draws into question the constitutionality of Public Law 95-375, 92 Stat. 712, 25 U.S.C.A. §1300(f), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is

a party, it is noted that 28 U.S.C.A. §2403(a) may be applicable.

STATEMENT OF THE CASE

This case arises out of a suit brought in the Arizona Superior Court, by Petitioner Val/Del, Inc., to enforce an arbitration provision of a contract made with the Yaqui Indian Tribe. The Tribe moved to dismiss the complaint for lack of jurisdiction over the Defendant, and the trial court dismissed Petitioner's Complaint on the grounds that the Defendant had sovereign immunity and that the agreement to arbitrate was not sufficient to waive its immunity.[1] Petitioner filed an original action in the Arizona Court of Appeals by

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[1] Petitioner had in its Complaint denied that Yaquis have sovereign status or immunity (¶2; App. 2-B to Petition for Review to the Arizona Supreme Court). The issue was also argued before the trial court in Petitioner's Opposition to Motion to Dismiss, §II, pp. 6-11 (App. 2-E to Petition for Review).

filing an extraordinary writ, called a Petition for Special Action.[2] The Arizona Court of Appeals, Division Two, reversed the trial court on the question of whether the agreement to arbitrate was a waiver of immunity, but affirmed its order that the Defendant was a Tribe clothed with sover-

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[2] This "Special Action" is not an appeal, but an original action in the appellate court. *See* Ariz. Const., art. 6, §§5, 18; Rule 1, Rules of Procedure for Special Actions; 17A Ariz. Rev. Stat. Ann. (West 1973). The decision, which "terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final even, if further proceedings are to be had in the lower court." *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 385, n. 7 (1976); and cases cited, *ibid.*

eign immunity.[3] The opinion held that enactment of 25 U.S.C.A. §1300(f)[4] automatically conferred sovereign immunity upon the Defendant, although the statute does not do so by its terms, but merely recognizes the Yaquis as eligible for Federal benefits to Indians. In determining that recognition automatically granted sovereign immunity, the Arizona court quoted from *Atkinson v. Haldane*, 569 P.2d 151 (1977), to the effect that:

> "Once the executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the Community

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[3] Before the Arizona Court of Appeals, the issues now raised were argued in Petitioner's Memorandum in Support of Petition for Special Action (App. 2 to Petition for Review to Ariz. S. Ct.). See pp. 9-14 therein, arguing that Congress cannot grant sovereign status to a group of people not fulfilling the definition of a tribe; and pp. 14-16, arguing that P.L. 95-375 does not afford sovereign status or immunity.

[4] Public Law 95-375, 92 Stat. 712, 25 U.S.C.A. 1300(f).

is entitled to all of the benefits of tribal status." 569 P.2d at 162.

Petitioner sought discretionary review by the Arizona Supreme Court.[5] The Arizona Supreme Court denied review on May 29, 1985 (App. B, *infra*).

The group of people which the Act recognizes as a Tribe are immigrants from Mexico, or their descendants. The relevant facts upon which a decision of tribal status depends consists of the history of these Yaquis, who immigrated to the United States individually or in small groups, over an extended period of time, to escape persecution in Mexico.

The definitive history of the Yaquis is contained in two works by a renowned anthropologist, which are part of the

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[5] Such review, of decisions of the Court of Appeals, is authorized under A.R.S. §12-120.24. There is no appeal of right.

record.[6] Spicer's historical facts were not disputed by Respondent, and were accepted by the Court of Appeals, which recognized that the Pascua Yaqui Indians were not indigenous to the State of Arizona, nor to the United States, but were immigrants from Mexico, and that they have not attempted to revive any system of government that their predecessors may have established in Mexico.

We summarize here Spicer's Yaqui history, which is described in fuller detail

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[6] Spicer, Edward H. [1906-1983], *The Yaquis -- A Cultural History*, University of Arizona Press 1980 (Petition for Review, App. 2-K). The citation 'II' is to distinguish this work from an earlier work, *Pascua -- A Yaqui Village in Arizona*, completed in 1938, but published by the University Press posthumously in 1984, which will be referred to as 'Spicer I' (*id.*, App. 2-J). Professor Spicer was an eminent anthropologist with highest national recognition (see inside of titlesheet of Spicer II) and *the* recognized authority on the Yaqui culture (see Affidavit of Prof. Michael Meyer, *id.*, App. 2-L).

in the Petition for Review, part of the record below.

When the Spaniards came to the area of what is now Sonora, Mexico, in 1533, they found native peoples called "Hiaquis" by the Spaniards (Spicer II, 5, 10). Their culture was centered around eight towns in the Yaqui Valley, on both sides of the Yaqui River. These peoples shared an agricultural economy (*id.*). Beginning in 1617, they were profoundly influenced by Jesuit missionaries. For 150 years, Yaqui communal life centered around Jesuit missions built in the "Eight Towns". A special and most pervasive theology developed which was an amalgamation of Christianity and indigenous religion (Spicer II, 70-73).

After the expulsion of the Jesuits in 1767 (*id.*, 50), and before the Mexican Revolution of 1810, there were numerous military clashes between the Spanish-speaking settlors and the Yaquis. The

Yaquis were subjugated to Spanish authority for military purposes, but each Yaqui town kept its own local government, through its elected officers (*id.*, 134).

For the next hundred years, the Yaqui culture was pressed by the influx of Mexican colonization and the "Yaqui Wars" ensued, which resulted in periodic suppressions of Yaqui revolts and the deportation of Yaquis, who were impressed into the Mexican military and ordered to remote regions, such as the Yucatan (*id.*, 137-49). Of the estimated 20,000 Yaquis in Mexico in 1890, only 3,500 stayed in the original Yaqui country. This time, between the late 1880's and 1937, is characterized by Spicer as that of the "broken communities" (*id.*, 298). There was a total eclipse of Yaqui political life (*id.*, 320).

During the times of Mexican military suppression, various Yaquis, as individuals, or as fragmented family groups, had

crossed the border into the United States. Until 1923, there had been no regular checking point set up by U.S. Immigration Service (*id.*, 247). The Yaquis migrations were tolerated by the United States under a doctrine of political asylum (*id.*, 242).

The greatest time of Yaqui influx was between 1900 and 1910, at the end of which decade 60% of all Yaquis who migrated to Arizona had arrived. There was a second wave of immigration between 1916-17 (*id.*, 245). After 1918, the "waves" had ceased; a few more of these peoples fled to Arizona in 1927-28 when there was an outbreak of anti-Yaquism in Sonora (*id.*, 236-48). Spicer postulates that there was still a "trickle" of Yaqui immigration as of the 1970's, and some reverse migration back to Sonora over the years (*id.*).

In the early years of the immigration, the Yaquis were scattered, going wherever employment could be found and where there

was unoccupied land. By 1918, the situation had begun to change. Concentrations developed in the early 1920's in the Tucson, west Scottsdale,[7] south Phoenix and Yuma (Somerton) areas of Arizona.

In the area of Tucson, Federal immigration authorities encouraged the Yaquis to concentrate in one area, so that it would be easier to keep track of them (Spicer II, 237). An area grew up that was to become known as "Pascua Village", but which had no specific geographical boundaries (*id.*, 239). Spanning neighborhoods ("Barrios") of Mexican and Mayo families, Pascua Village physically merged imperceptibly into the City of Tucson Corporate Limits (Spicer I, p. 6). There, 850 individuals who regarded themselves as Yaquis

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[7] This settlement of farm workers was completely disbanded in 1944 by the Salt River Project, upon whose lands the Yaquis had been given space (Spicer II, 241).

lived among non-Yaquis, and by 1937, two-thirds of the "Yaquis" residing in Pasqua Village were United States-born citizens (*id.*, 8).

In 1937, in addition to Pascua Village, there was another concentration of Yaquis in the Barrio Libre, immediately adjacent to and southwest of downtown Tucson, with population about equal to Pascua's. Two other major Yaqui communities then existed in the State -- Guadalupe (south of Phoenix) and Eskatel (Scottsdale). These four communities, each centered around a church, remained stabilized in population, each having about 400-500 persons, from the mid-1930's until the mid-1960's, while the scattered Yaqui population throughout the State grew from 3,000 to 6,000 in this same period of time (Spicer II, 246).

Contrasted to the Yaqui towns of Sonora, none of the communities in Arizona

had fixed territorial boundaries. Rather, the settlements were territorially amorphous, blending into surrounding non-Yaqui households. The Yaqui community was not a residential unit but was identified by participation in religious ceremonies: "The Yaqui community, then, could be defined as a congregation rather than a residential unit" (*id.*, 300).

The Yaquis never revived the civil and military features of the town governments of Sonora in this country, because they recognized that functions of their traditional officers were being fulfilled by Federal and State officials (*id.*, 244).[8]

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[8] In 1923, Pascua Village Yaquis did elect some "judges". The only judgment rendered by their judges was not generally accepted. The complaint was then taken to a Superior Court judge, who made a decision which was accepted. Thus ended the idea of Yaqui civil government in Arizona (Spicer II, 244).

In 1964, this gradual assimilation of Yaqui immigrants into American society was reversed by congressional passage of a private bill (Private Law 88-350, 78 Stat. 1196), which granted 200 acres of Federal land, located ten miles southwest of Tucson, to the "Pascua Yaqui Association, Inc., a nonprofit corporation formed under the laws of Arizona". Accompanying this grant of land was a grant of $99,000.00 by the Office of Economic Opportunity to this Association (Spicer II, 254).

These grants became a subject of acrimonious public debate. Residents of Pascua Village (to become known as "Old Pascua"), who did not want to move objected.[9] Other Yaqui communities resented what they considered a singling out for special benefits

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[9] Only about one-third of the Pascua Village Yaquis moved to New Pascua (Spicer II, 239).

of only one of several Yaqui communities (*id.*, 254-55).

The Association, in determining who was eligible for membership and land in New Pascua, rejected qualifications based on "blood", but instead went to a ceremonial or religious qualification -- permitting "any person who has been ceremonially associated with the Yaqui Indians" to participate (*id.*, 256). Thereafter, "Yaquis", as thus delineated, from all over southern Arizona were assigned lots by the Association. By 1979, New Pascua had become the largest "Yaqui" community in Arizona, with a population of over 1,000. Old Pascua retained more than 350, while Tucson's Barrio Libre had 500-600 (*id.*, 257). In 1977, Guadalupe, of approximately equal size, had incorporated as an Arizona municipality (*id.*, 258).

In 1978, Public Law 95-375, which is of concern in this case, was passed. It

provided that membership in this "tribe" would be granted to (A) all members of the Pascua Yaqui Association, Inc., who applied for enrollment in the Tribe within one year from the date of the Act; (B) all persons of "Yaqui blood" who were citizens of the United States and who, within two years from the date of the Act, were admitted to membership in the Association; and (C) direct lineal descendants of persons falling within categories A or B. The Act provides that the members of the "tribe" are eligible for the services and assistance provided to Indians by any department, agency or instrumentality of the United States. Within thirty months, the "tribe" was required to adopt a constitution and bylaws and a membership roll, all of which were to be published in the Federal Register.

This "tribe" has never been able to agree on a constitution or bylaws

(see Affidavit, Petition for Review, App. 2-E-D), and consequently, neither a constitution nor bylaws has been published in the Federal Register (See Affidavit, Petition for Review, App. 2-E-B).

Summarizing, the 200 acres over which the Respondent contends the State of Arizona has little or no jurisdiction, was never, until 1964, associated in any way with Yaqui culture. The Yaqui people are not indigenous to this country; rather, they are natives of an area that is part of Mexico. At the time of the admission of Arizona to the Union, February 14, 1912, there were only scatterings of Yaquis in this state; discernible Arizona communities of Yaquis were then nonexistent. Pascua Village was not even conceived until 1921. The geographical boundaries of this "village" were indefinite; it was an integral part, for all civil and criminal law purposes, of the City of Tucson and of the

State of Arizona. There has never been, in this country, any semblance of self-government by these Yaqui immigrants, except to the extent that they participate in the politics of this country as citizens. The right to participate in the "tribal" activities now transpiring in New Pascua is not based on ancestry but is determined by ". . . who has been ceremonially associated with the Yaqui Indians". This "tribe" has never been able to agree on a constitution or bylaws. It is this group of persons, integrated more by religion than anything else, that has been declared by the decision below to have sovereign immunity from suit in the courts of general jurisdiction of this State.

REASON FOR GRANTING THE WRIT

This case is of fundamental importance to the State of Arizona, and particularly to those of her citizens living in the Tucson area.

When Arizona was admitted to the union, it received the same sovereignty and prerogatives as an original state. *Shively v. Bowlby*, 152 U.S. 26, 30 (1894). When Arizona was admitted as a state, the Yaquis had no territory or government within this State; and Arizona Yaquis have never had any of the attributes of a sovereign nation. But on the strength of Public Law 95-375, the persons associated together as the Pascua Indian Tribe are now exercising police powers, are excluding the State from taxing its people and its lands, and are claiming the immunities of a sovereign nation.

The opinion below agreed with Petitioner that the Yaquis did not exhibit those characteristics required for recognition as a sovereign Indian nation (Opinion, App. A at 4-6), but held, on the authority of *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), that the issue raised is a

"nonjusticiable political" question. The opinion quotes from *Haldane*, but otherwise contains no analysis of the vital question posed.[10] This Court should grant certiorari to decide whether Congress really intended to constrict the sovereignty of Arizona, and if so, whether the Act is within Congress' constitutional powers to regulate commerce with the Indians.[11]

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[10] The Arizona Court of Appeals did address the issue of whether any sovereign immunity vested in the Yaquis by Public Law 95-375 was waived by the provisions of 28 U.S.C.A. §1360; an issue not raised here.

[11] The Congressional authority to give special treatment to Indian tribes originally derived from both the treaty making power and the power to regulate commerce with the Indian Tribes. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Congress discontinued treaty making with Indians in 1871, and the modern authorities refer to the Indian Commerce Clause as the primary constitutional provision supporting Congressional authority over Indians. F. Cohen, *Handbook of Federal Indian Law*, Ch. 3, §A at 208.

Determining the relationship of Indian tribes in this country to the governmental structure at large has always been an important facet of this Court's jurisdiction.[12] That relationship is an ". . . anomalous one, and of a complex character." *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 1112 (1886). But the the Court below did not begin to assess that anomalous and complex relationship, and its reflexive conclusion clashes with important precedent from this Court, and allows a result that plainly exceeds what was intended to be covered by the Indian Commerce Clause.

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12 This Court has often had to review the Arizona courts on the subject. *E.g.*, *Williams v. Lee*, 358 U.S. 217, (1959); *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); and *Central Machinery Co. v. Ariz. State Tax Commissioner*, 448 U.S. 160 (1980).

The Congress' power under the Indian Commerce Clause is limited to situations in which a tribe has historically had a distinct existence as such:

> "As long as these Indians *remain* a distinct people, with an *existing tribal organization*, recognized by the political department of the government, Congress has the power to say with whom and on what terms they shall deal . . ." *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 195 (1876) (emphasis added).

This Court has held that Indian tribal sovereignty does not arise by delegation from, or creation by, the United States Government, but by Federal Government tolerance of a *pre-existing* sovereignty. *E.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("distinct political communities, having territorial boundaries, within which their authority is exclusive"); *United State v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 (1940) (". . . it is as though the immunity

which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did"). But even *Atkinson v. Haldane*, recognized:

> "Rather, we think it [tribal sovereign immunity] advances the principle of allowing *formerly self-governing units* brought within the sovereign powers of the United States to retain some vestige of that sovereignty until the great sovereign decides that discontinuance of that vestige is in the interests of public policy." 569 P.2d at 160 (emphasis added).

As our nation expanded, and Western states were added in areas occupied by sovereign Tribes, Congress possessed the authority to regulate intercourse with these Tribes, and protected those sovereign powers from encroachment by the states. Indian sovereignty is not to be created anew, but is to be tolerated to allow existing tribes to persevere. But where sovereign governments have not persevered, this Court has held that the sovereignty of

the states should not be restrained. *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973), demonstrates the point. In *McClanahan*, this Court held that Arizona's income tax could not be applied to a Navajo Indian's income earned on a Navajo reservation. In his opinion for the Court, Justice Marshall distinguished three previous decisions which had permitted state laws to be operative as to Indians, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), because these were decisions as to Indians ". . . who do not possess the usual accoutrements of tribal self-government" (411 U.S. at 168, 169).

In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), this Court said:

> "Altnough there are remnants of the form of tribal sovereignty, these Indians [Five Civilized Tribes] have no effective tribal sovereignty as in *Worcester v. Georgia, supra,* . . ." 319 U.S. at 603.

McClanahan stated:

> "It must always be remembered that the various Indian tribes were once independent sovereign nations, and that their claim to sovereignty long predates that of our own government." 411 U.S. at 172.

The only rationale for granting sovereign immunity to Indian tribes -- tolerance of a pre-existing sovereignty -- is not present here. Congress has no power to take back the sovereignty which it has granted to the State of Arizona over its territory. Accordingly, if Congress intended to grant sovereign immunity to the Pascua Indian Tribe (which it never expressly did), it exceeded its authority.

The Arizona Court of Appeals' opinion on this issue did not recognize these cases, nor apply these principles. Instead,

it relied solely upon *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). Although involving an Indian tribe which had migrated from another country, *Atkinson* is no support for creating an Indian tribe out of a group of peoples who have never historically had any semblance of tribal status. *Atkinson* was concerned with the Metlakatla Indian Community which had "an organized tribal government before they migrated from British Columbia to Alaska" (569 P.2d at 153). This tribe had a ". . . village council as a legitimate governing body" (*id.*). When it arrived upon a Federal land grant in Alaska in 1887, the Metlakatla established a tribal government which ". . . passed bills, collected taxes, appointed police officers, carried out public works and looked after public safety" (*id.*). In 1891, some sixty-seven years before Alaska was granted statehood, Congress granted to these Indians a

reservation on the Annette Islands (the only Indian reservation in the vast state of Alaska) (*id.*).

> "The history of the Metlakatlans reveals a strong central tribal organization unlike most Alaska Native groups." 569 P.2d at 155.

Atkinson was apparently cited by the Court below primarily for its pronouncement that the recognition of an Indian tribe is a "nonjusticiable political question" (569 P.2d at 162). But *Atkinson* has no support for that conclusion, and its conclusion and that of the Court below in this case is contrary to cases of this and other Federal courts. In *Baker v. Carr*, 369 U.S. 216 (1962), the Court considered whether the tribal status of Indian communities is a political question:

> ". . . it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . Able to discern what is 'distinctly Indian', . . . the courts will strike any heedless

> extension of that label. *They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.*" 369 U.S. at 710 (emphasis added).

Indian law decisions indicate that, while it may be a political question whether to "recognize" a tribe for Federal government protection and benefits, the determination that an Indian community is entitled to tribal status is not. Congress has unfettered power to decide when "recognition" of a tribe shall end:

> ". . . Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship [recognition] which has been maintained over the Indians shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage." *United States v. Sandoval*, 231 U.S. 28 (1913).

However, Congress does not have unfettered power to create an Indian tribe where none existed before:

> "[I]t is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Ibid.*

See also Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957), in which the Fourth Circuit inquired into the history of the Cherokees: the manner in which they acquired their land and their relationship with the Federal Government, to determine that the group deserved tribal status (*id.*, 294-95). Only after determining that the group was entitled to tribal status did the court apply the rule that it remained a political question whether the tribe should continue to enjoy the protective and regulatory power of Congress (*id.* at 296).

The Court's rule was also applied in *Narragansett Tribe of Indians v. Southern Rhode Island Land & Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976), which recognized that a court "will not stand impotent before an obvious instance of manifestly unauthorized exercise of power" (*id.*, 814). It concluded that the determination of tribal status of the plaintiffs did not implicate the factors discussed in *Baker v. Carr* and, thus, did not constitute a political question.

In other words, Congress could hardly bestow "tribal" status upon bands of immigrants such as the Irish who fled the potato famine; or refugees fleeing from Vietnam or Central America; or Haitian or Cuban "boatmen"; without being subject to judicial review of whether those groups, or the Yaquis of this case, are sovereign Indian tribes.

There remains the question of whether Congress really intended to confer sovereign immunity on the Pascua Yaqui Tribe by enacting 25 U.S.C. §1300(f) (App. 2-M). This Act does not expressly grant sovereign immunity. When a statute or ordinance

> ". . . is susceptible to different readings, one reading which would make it constitutional and a second which would make it unconstitutional, . . . a court must read the statute to be constitutional." *Anderson v. Edwards*, 505 F. Supp. 1043, 1048 (S.D. Ala. 1981). *See Osborne v. Massachusetts Bonding & Ins. Co.*, 229 F. Supp. 674 (D. Ariz. 1964).

25 U.S.C. §1300(f) is a statute which is susceptible to both a constitutional and an unconstitutional meaning in that it may be interpreted to confer sovereignty or merely recognize the tribe for the purpose of extending welfare benefits.

An Indian group may be recognized by the Federal Government as a tribe for some purposes, but not for others:

> "[T]ribes cannot be neatly divided into 'recognized' and 'nonrecognized' tribes for all purposes; rather, a tribe may 'exist' for some purposes but not for others." F. Cohen, *Handbook of Federal Indian Law*, *supra*, ch. 1, §B(2)(a), p. 7.

In this Act, Congress obviously intended to extend certain welfare benefits to these Indians, but also obviously intended that these lands remain under the civil and criminal jurisdiction of the State of Arizona. This intent is being frustrated by the granting of sovereign immunity to this "tribe". The Court below seemed oblivious to the proposition that a hard look should be given to a statute for a construction that may uphold its constitutionality. It also did not consider the possibility of the Act being valid to bestow Federal benefits on the Yaquis without automatically clothing them with sovereignty which had been taken away from Arizona.

This Court must grant review even though the court below granted Petitioner some relief. After ruling that the Yaquis were a sovereign Indian tribe, the court concluded that it had waived its immunity, to allow arbitration of the dispute before it. This leaves Petitioner with incomplete relief, for two reasons. On the merits, the Yaquis have raised their Indian status as a bar to substantive enforcement of the contract because, they assert, it was an agreement that should have been approved by the Bureau of Indian Affairs but wasn't.[13] More importantly, a waiver for arbitration does not appear to solve the problem of tribal sovereignty barring the Arizona Superior Court from serving process, or

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13 The court below refused to pass upon that issue, finding it to have been waived before the trial court. Petitioner believes that waiver to be final, and not remediable, but Respondent may disagree.

levying execution of judgment, upon Yaquis or the Yaqui lands.

In *Williams v. Lee*, 83 Ariz. 241, 248, 319 P.2d 998 (1958), *overruled on other grounds*, 358 U.S. 217 (1959), the Arizona Supreme Court has said that process to execute on a judgment may not run to reservation property. This Court and others have held that jurisdiction might be conferred only for rendition of verdict and entry of judgment, *Memphis & C. RR. Co. v. Tennessee*, 101 U.S. 337 (1880); *Westinghouse Electric Co. v. Chambers*, 164 Cal. 131, 145 P. 1025 (1915), leaving the sovereign to determine for itself whether to pay the judgment. *Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 709 (2d Cir. 1930). Even if Petitioner were ultimately successful in countering these precedents, the land itself, held in trust, may remain immune from levy if the Act is not invalidated. *Snohomish County v.*

Seattle Disposal Co., 425 P.2d 22, 25 (Wash. 1967).

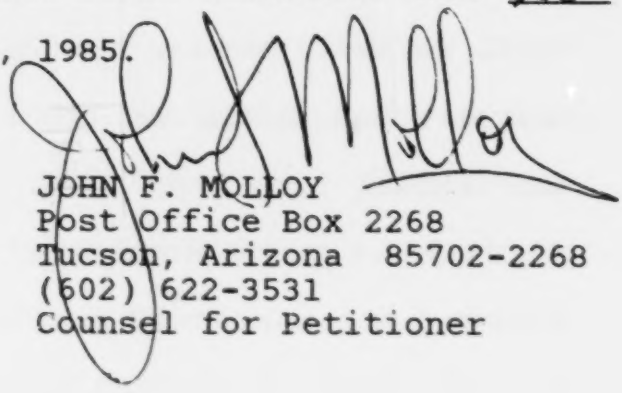
Petitioner has been granted only partial relief, because the court below ruled against Petitioner on the Federal question now raised here. It is an issue of institutional significance, and must be addressed and correctly decided.

CONCLUSION

There is no justification for granting sovereign immunity to this group of people, who are held together mostly by participating in religious ceremonies; it is contrary to the basic concepts of Indian law to allow this carving up of the State of Arizona into another sub-sovereignty. The granting of civil, criminal and tax immunity to this particular group because some of them, or their ancestors, were part of a Mexican culture with identifiable religious and societal values is unprecedented and can only have very unfortunate long range

consequences. Certiorari should be granted.

RESPECTFULLY SUBMITTED this 26th day of August, 1985.



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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VAL/DEL, INC., a Delaware corporation, Petitioner,	)	NO. 2 CA-SA 133
vs.	)	O P I N I O N
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pima, HONORABLE LILLIAN S. FISHER, a Judge thereof, Respondents, and PASCUA YAQUI TRIBE, Real Party in Interest.	)	[Filed Jan 2, 1985]

SPECIAL ACTION PETITION

RELIEF GRANTED

B I R D S A L L, Chief Judge.

This special action has been taken from the trial court's dismissal of the petitioner's complaint. We have accepted jurisdiction because the petitioner's remedy by appeal is not adequate and because the question presented is a matter of great significance to those who may desire to do business with the respondent tribe. See State ex rel. Corbin v. Superior Court of Maricopa County, 138 Ariz. 500, 675 P.2d 1319 (1984); University of Arizona Health Sciences Center v. Superior Court of the County of Maricopa, 136 Ariz. 579, 667 P.2d 1294 (1983).

On January 11, 1984, the real party in interest Pascua Yaqui Tribe and Val/Del, Inc., the petitioner, entered into an agreement whereby Val/Del was to manage the tribe's newly established bingo operation. The agreement called for Val/Del to be retained on an exclusive basis to finance, manage, and operate the bingo operation for

the tribe for a seven-year period commencing January 1, 1984. On or about May 13, 1984, the tribe apparently excluded petitioner's employees and managers from the property, alleging the existence of certain defaults by petitioner under the management agreement.

On June 27, 1984, petitioner filed its complaint in the present lawsuit in Pima County Superior Court seeking to have the arbitration clause of the agreement enforced. Service was made upon the tribe on June 27, 1984, and its motion to dismiss was filed July 9 and granted on August 7. The court found that the Pascua Yaqui Indian Tribe is a federally recognized tribe entitled to sovereign immunity and cannot be sued without having waived such immunity or otherwise granted its consent to suit. Although the trial court found that the tribe had consented to having a lawsuit between the parties tried in its tribal

court, it held that the arbitration clause in the subject contract was not a legally sufficient waiver of sovereign immunity to permit the action in state court and dismissed the complaint.

The powers of Indian tribes have been described as "inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, Handbook of Federal Indian Law 122 (U.N.M. ed. 1971). Before the Europeans arrived, Indian tribes were self-governing sovereign political entities. See McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). One of the inherent powers possessed by Indian tribes like all sovereign bodies, was immunity from suit. In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), Justice Marshall stated the basis of this immunity:

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization' the 'Indian Nations are exempt from suit.'" 436 U.S. at 58, (citations omitted).

Arizona courts have also recognized the doctrine of tribal sovereign immunity. In Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968), our supreme court held that state courts did not have jurisdiction over an Indian tribe which had allegedly committed a tort while engaging in a business enterprise in the State of Arizona but outside the boundaries of the tribal lands. The court held that the Colorado River Indian Tribe was a sovereign immune from suit and could not be subjected to the jurisdiction of Arizona courts without its consent or the consent of Congress. A similar result was reached in White

Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971), and both cases were noted in the recent Division One case of S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (App. 1983).

We note here that sovereign immunity as discussed in these cases seems to be limited to decisions wherein jurisdiction of state and federal courts was thwarted. However, since one of the primary purposes of the doctrine of sovereign immunity is to protect tribal trust property from encumbrances, Atkinson v. Haldane, 569 P.2d 151 (Alaska, 1977), it must necessarily mean freedom from suit regardless of where the suit is brought. The immunity of Indian tribes, however, is not absolute. United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981). It exists only at the sufferance of Congress and is subject to complete defeasance. United States v. Wheeler, 435 U.S.

313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Either explicit congressional authority or consent of a tribe is necessary to find a waiver of the immunity. United States v. Oregon, supra.

Petitioner's first point of attack is that the tribe does not enjoy sovereign immunity since it does not possess the requisite characteristics of a sovereign Indian nation as set forth in regulations promulgated by the Department of Interior. See 25 C.F.R. Part 83. The procedures established in those regulations, which petitioner alleges must be met before a tribe will be accorded federal recognition and therefore enjoy immunity from suit, include:

> "(a) [T]he petitioner [tribe] has been identified from historical times until the present on a substantially continuous basis, as 'American Indian' or 'aboriginal.'
>
> * * *

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present." 25 C.F.R. §83.7.

Petitioner presented to the trial court two books [1/] by Dr. Edward H. Spicer as Authority for the proposition that the Pascua Yaqui Tribe would not qualify for federal recognition under the Code of Federal Regulations requirements. Spicer was an acknowledged authority on the history of the Pascua Yaquis, and his books establish that the Yaquis do not have single roots but are a historically mixed-blood people who lived in western Mexico on the Gulf of California from approximately the 1600's to

the present. Beginning in the late 1880's, small groups came from time to time across the international border to Arizona and California. Therefore, petitioner argues, since the Pascua Yaquis are not indigenous to this area, but rather are immigrants from Mexico, and because Dr. Spicer's books show that the tribe has not attempted to revive any system of government their predecessors may have established in Mexico, they would not qualify for federal recognition under 25 C.F.R. §83.7. We cannot fault this conclusion and, in essence, neither does the tribe.

The tribe relies instead on 25 U.S.C. §§1300f-1300f(2) which were adopted by Congress in 1978 and in which Congress recognized the Pascua Yaqui Indian people and declared them eligible

> "for the services and assistance provided to Indians because of their status as Indians or through any department, agency, or instrumentality of the United

> States, or under any statute of the United States." 25 U.S.C. §1300f(a).

Additionally, Congress provided that certain provisions of 25 U.S.C. §§461-492 entitled "Protection of Indians and Conservation of Resources," would be extended to the Pascua Yaqui Indian people. Included in that subchapter is §479, the definition section, which recognizes the term Indian as referring to all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction. The Supreme Court of Alaska, in Atkinson v. Haldane, supra, was presented with a similar situation involving the Metlakatla community. The court found that, although the Metlakatla community had come to Alaska from British Columbia, that that was not a significant factor in view of the fact that the community had been recognized by the federal government as an organized tribe and thus should be given

the protections accorded other tribes. The court stated:

> "[The tribe asks] application of the principle that tribes under the tutelage of the United States are immune from suit in the absence of congressional consent. . . .
>
> Thus, we conclude that the Metlakatla Indian Community, despite its unique history, is entitled to sovereign immunity. . . . The Community has been recognized by the United States government as an Indian tribe and has been treated accordingly. Once the executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the Community is entitled to all of the benefits of tribal status. The Supreme Court of the United States declared in U. S. Fidelity [United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940)] that one of those benefits is tribal sovereign immunity in the absence of congressional waiver. Court decisions from United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) to McClanahan v. State Tax Commission, 411 U.S. 164, 170-72, 93 S.Ct. 1257, 1261-62, 36 L.Ed.2d 129, 134-36 (1973) have firmly established plenary congressional power over Indian affairs. Article VI, clause 2 of

> the United States Constitution provides:
>
> 'This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.'
>
> The supremacy of the decisions of the Supreme Court of the United States has been recognized since Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816). Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case." 569 P.2d at 162-3.

Petitioner contends that regardless of the recognition by the federal government of the Pascua Yaqui Indian people in 25 U.S.C. §1300f, that recognition was conditioned upon the tribe's waiver of sovereign immunity because of the provisions of 25 U.S.C. §1300f(c):

> "Provided, That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79)."

The act of August 15, 1953, referred to in subsection (c), commonly known Public Law 280, extended to certain states criminal jurisdiction over offenses committed by or against Indians in Indian country (18 U.S.C. §1162) and civil jurisdiction over causes of action arising in Indian country to which Indians are parties (28 U.S.C. §1360). PL-280 apparently began as an attempt by California to extend criminal jurisdiction to all Indian lands within the state. It has been pointed out that the extension of state criminal jurisdiction was the primary thrust of the legislation and that the civil section was added without great discussion. Atkinson v. Haldane, supra. PL-280 automatically transferred

the jurisdiction of certain civil and criminal matters involving Indians on Indian lands to five enumerated states -- California, Minnesota, Nebraska, Oregon, and Wisconsin -- and tendered the same jurisdiction to all others. The statute was amended in 1968 in conjunction with the adoption of the Indian Civil Rights Act, 25 U.S.C. §§1301-1341 to require that future assumptions of jurisdiction by a state could be made only with the consent of the tribe in question. 25 U.S.C. §§1321(a) and 1322(a). The amendments also authorized the assumption by states of partial subject matter or territorial jurisdiction and permitted states which had previously accepted jurisdiction to retrocede such jurisdiction to the federal government, either in whole or in part. 25 U.S.C §§1321(a) and 1322(a).

Petitioner contends that, by conferring jurisdiction over Pascua Yaqui lands

to the Arizona courts pursuant to PL-280, the effect of 25 U.S.C. §1300f(c) is to waive the tribe's immunity from suit. This contention rests on the resolution of the question of whether Congress intended PL-280 as a waiver of an Indian tribe's sovereign immunity. In Bryan v. Itasca County, Minnesota, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the Supreme Court emphasized that the granting of state jurisdiction was not intended to "result in the undermining or destruction of such tribal governments as did exist . . . ." and concluded that "[t]he Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, . . ." 426 U.S. at 388-389. The Bryan Court utilized legislative history in the wording of the act itself to determine what Congress expressly intended and decided to go no further. The Court stated:

> "Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. . . . This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U.S. at 381.

The Court went on to state:

> "[T]he consistent and exclusive use of the terms 'civil causes of action,' 'aris(ing) on,' 'civil laws . . . of general application to private persons or private property,' and 'adjudicat(ion)' in both the Act and its legislative history virtually compels our conclusion that the primary intent of §4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." 426 U.S. at 385.

In Santa Rosa Band of Indians v. King County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 97 S.Ct. 731 (1977), the Ninth Circuit Court of Appeals interpreted 28

U.S.C. §1360 as containing an ambiguity and determined that the rules of construction dictated that all ambiguities be resolved in favor of the Indians. 532 F.2d at 660. Both the Bryan and Santa Rosa Band of Indians Courts thus adopted a narrow interpretation of the grant of jurisdiction to the states in 28 U.S.C. §1360(a).

These cases were followed by the Alaska Supreme Court in Atkinson v. Haldane, supra, where the court concluded that the sovereign immunity of the Indian community therein could be deemed waived only if it were clear from the unambiguous language of 28 U.S.C. §1360(a) and its legislative history that Congress intended such a waiver. The court noted that the legislative history did not specifically mention any waiver of tribal sovereign immunity and that the ambiguity present in 28 U.S.C. §1360(a) was not resolved by the legislative history. The court found the absence

of any clear waiver of sovereign immunity in the statute of controlling significance and concluded that without such an express congressional waiver of immunity, one should not be implied. The court noted that the jurisdictional grant in 28 U.S.C. §1360(a) was limited by 28 U.S.C. §1360(b), which provides:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

The court concluded that the limitation "serves the same interest that the doctrine

of sovereign immunity serves, i.e., the preservation of tribal trust property 'encumbrances.'" 569 P.2d at 167. Therefore, the court theorized, §1360(b) demonstrated that no waiver of tribal sovereign immunity was intended by §1360(a).

> "If Congress had wanted to waive tribal immunity, it strikes us that it would have allowed execution against purely tribal assets, e.g., tribal real property. Since the underlying reasons for the restrictions in §1360(b) are similar to the underlying reasons for tribal sovereign immunity, construing the two subsections together, we conclude that §1360(a) does not constitute a waiver of tribal sovereign immunity." 569 P.2d at 167, n. 59.

We align ourselves with the reasoning of the courts in these cited decisions and hold that Congress, by virtue of its enactment of 25 U.S.C. §1300f(c), which applied 28 U.S.C. §1360(a) and its granting of civil jurisdiction to the State of Arizona over Pascua Yaqui Indian lands, did not

waive the sovereign immunity of the Pascua Yaqui Indian Tribe. 2/

Having concluded that the Pascua Yaqui Indian Tribe, as a federally recognized tribe, is entitled to sovereign immunity, we must now decide if it waived its immunity by agreeing to arbitrate any dispute arising out of its contract with petitioner. Section 12 of the contract provides:

> " Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, supra, quoting United States v. Testan, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), which quoted United States v. King, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52

(1969). There is only one case cited to us, and our independent research has failed to turn up any other, which has addressed the precise issue of whether an arbitration clause constitutes an explicit waiver of immunity from suit. We agree with the Alaska Supreme Court in its reasoning in Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) wherein it stated:

> "[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. Tucker v. Byler, 27 Ariz.App. 704, 558 P.2d 732, 735 (Ariz.App. 1976); Quenzer v. Quenzer, 225 Kan. 83, 587 P.2d 880, 882 (Kan. 1978). The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the tribe] possessed. Furthermore, under similar circumstances the Ninth Circuit Court of Appeals has held that a clause in a contract stating that the federal courts would resolve

> any disputes arising from the contract constituted an express waiver of a tribe's sovereign immunity. United States v. Oregon, 657 F.2d 1009, 1016 (9th Cir. 1981). There is little substantive difference between an agreement that any dispute arising from a contract shall be resolved by the federal courts and an agreement that any dispute shall be resolved by arbitration; both appear to be clear indications that sovereign immunity has been waived." 658 P.2d at 760-61.

The cited case of United States v. Oregon referred to Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970) wherein the Eighth Circuit found that the adoption by the Omaha Tribe of a "sue and be sued" clause in its corporate charter amounted to an express waiver of sovereign immunity in regard to the quiet title action involved. In United States v. Oregon, supra, the Ninth Circuit Court of Appeals found that the tribe, in its contract with the state, had agreed that in the event problems arose that could not be

solved by mutual agreement, the parties would submit the issues to federal court for determination. The Ninth Circuit ruled that "the Tribe may not at this stage renege on its earlier agreement." 657 F.2d at 1016.

We agree with the reasoning in Native Village of Eyak, supra. Before entering into the arbitration agreement, the respondent tribe was free from suit by petitioner. However, after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity. The tribe argues in its response to the petition for special action that while as an immune sovereign it could not have been sued without its consent, it has given its limited consent to be sued within the jurisdiction of the Pascua Yaqui Tribal Court. We do not agree. The arbitration

agreement did not draw the distinction between the tribal court system and any other court system, but rather provided that any court of competent jurisdiction would suffice. Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona under 25 U.S.C. §1300f(c) which applied 28 U.S.C. §1360(a) to Pascua Yaqui Indian lands, notwithstanding the fact that the Pascua Yaqui tribal court may also have jurisdiction.

The tribe argues, and argued to the trial court, that even if the arbitration clause were deemed to be a waiver of the tribe's sovereign immunity, the entire contract including the clause is void, citing 25 U.S.C. §81. That statute provides, in part:

> "No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in

> prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> * * *
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

The tribe argues that the agreement between the petitioner and the tribe was not approved or endorsed by the Secretary of the Interior and the Commissioner of Indian Affairs. The record before us is not clear. The signatories to the contract include a Mr. Samuel L. Hilliard, who, it appears, is a representative of the Department of the Interior's Bureau of Indian Affairs. The tribe's motion to dismiss the complaint below did not allude to the allegedly void character of the contract. This argument was raised only in the tribe's response to the petitioner's

opposition to the motion. By inference, the trial court discounted the argument since it referred to the arbitration clause in the contract as not constituting a legally sufficient waiver, thereby implying that the contract itself was to be considered valid. The problem here is that the tribe apparently waived this argument before the trial court and, indeed, before this court by arguing that the controversy over the agreement properly belongs before the tribal court, and not arguing that no agreement existed. On this state of the record we cannot consider this argument in order to deny relief from what we find to be an abuse of discretion by the trial court.

The order of the trial court dismissing petitioner's complaint is vacated and the cause is remanded to the trial court for further proceedings.

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[1]/ E. Spicer, Pascua, A Yaqui Village in Arizona (Univ. of Ariz. Press ed., 1984).

E. Spicer, The Yaquis: A Cultural History (Univ. of Ariz. Press, 1980).

[2]/ The tribe argued below and argues to this court that even if 25 U.S.C. §1300f(c) had given Arizona civil jurisdiction over Pascua Yaqui Indian territory, a proclamation issued by Arizona Governor Bruce Babbitt, dated February 6, 1984, effectively returned jurisdiction to the federal government. That proclamation stated in part:

> "WHEREAS, Public Law 95-375 requires the State of Arizona to exercise criminal and civil jurisdiction over Pascua Yaqui lands as if it had assumed jurisdiction . . . and
>
> WHEREAS, the State of Arizona is constitutionally prohibited from claiming jurisdiction over Indian lands pursuant to paragraph four of Article XX of the Arizona Constitution; and
>
> WHEREAS, this constitutional disclaimer impedes the State from exercising criminal and civil jurisdiction over Pascua Yaqui lands, notwithstanding the Language in PL 95-375, 25 U.S.C. 1300(f)(c) [sic] which purports to grant such jurisdiction to Arizona;
>
> * * *

> I, Bruce Babbitt, Governor of the State of Arizona, . . . do hereby retrocede all civil and criminal jurisdiction, or purported jurisdiction, granted to the State of Arizona, pursuant to Public Law 95-375 over that area of land within this State conveyed to the Pascua Yaqui tribe from the United States and held in trust for the Pascua Yaqui tribe by the United States Secretary of the Interior, . . ."

We note that the alleged retrocession of jurisdiction does not comply with the requirements of 25 U.S.C. §1323(a) which provides that the federal government is authorized to accept a state's retrocession. To effectively retrocede jurisdiction, there must be formal acceptance of the retrocession by the Secretary of the Interior, published in the Federal Register, specifying the date of the retrocession. 25 U.S.C. §1323, note. There is nothing in the record to show acceptance by the Secretary of the Interior nor a published acceptance of same in the Federal Register. Arizona Constitution, Article 20, §4, alluded to above, provides in part that Indian lands "shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." The real party in interest argues that therefore the Arizona Constitution precludes the state from exercising jurisdiction in this case. However, such an argument was found to be without merit in Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837, reh'g denied, 104 S.Ct. 209 (1983) wherein the Supreme

Court recognized state jurisdiction, stating: "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our activities on Indian lands." 103 S.Ct. at 3211. Similarly, it has been held that the language of "absolute jurisdiction and control" means "undiminished, not exclusive" jurisdiction. Organized Village of Kake v. Egan, 369 U.S. 60, 71, 82 S.Ct. 562, 7 L.Ed.2d 573, ___ (1962); Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976).

BEN C. BIRDSALL,
Chief Judge.

CONCURRING:

LAWRENCE HOWARD,
Judge.

JAMES D. HATHAWAY,
Judge.

SUPREME COURT
STATE OF ARIZONA

30 May 1985

RE: VAL/DEL, INC. vs. PIMA COUNTY SUPERIOR COURT/HON. LILLIAN S. FISHER/PASCUA YAQUI TRIBE
Supreme Court No. 18079-PR
Court of Appeals No. 2 CA-SA 0133
Pima County No. 217524

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 29, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review [Val/Del, Inc.] = DENIED

FURTHER ORDERED: Petition for Review [Pascua Yaqui Tribe] = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 30th day of May, 1985.

S. ALAN COOK, Clerk